VIRGINIA LAW REVIEW

Published Monthly, During the Academic Year, by University of Virginia Law Students

Subscription Price, $2.50 per Annum - - 35c per Number

DELEGATION TO THE JUDICIARY OF NON-JUDICIAL POWERS.—Under the theory of the separation of powers, which is the basis of the Federal and of all the State constitutions, the three great branches of government, the legislative, executive and judicial, are equal and coördinate. No one of them possesses the authority to impose on either of the others powers foreign to its nature. Thus it may be stated broadly that the legislative department cannot confer on the judiciary powers which are not judicial in character. The difficulty presented is what powers are non-judicial. The answer must necessarily depend in large measure upon the provisions of the several constitutions and the extent to which they have applied the doctrine of the separation of powers.[1] The question has been further complicated by the delegation to subordinate governmental bodies of executive and legislative, as well as judicial power.[2]

Under the provisions of the Federal Constitution, the judges early decided that they could not exercise non-judicial powers, even though these powers were expressly conferred on them by Congress.[3] The Act of March 23, 1792, required the Circuit

[1] State *v.* Brill, 100 Minn. 499, 111 N. W. 294, 639, 10 Ann. Cas. 425. See 1 STORY, CONSTITUTION, 5th ed., § 525 *et seq.*

[2] People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596; People *v.* Provines, 34 Cal. 520. This California case is interesting, since it overruled a long line of cases which had undoubtedly carried the separation of powers too far. See cases therein cited and criticised.

[3] Hayburn's Case, 2 Dall. 409; United States *v.* Ferreira, 13 How. 40. Hayburns' Case is interesting, since it was decided previous to

Courts of the United States to hear the claims of persons who applied for pensions. According to the statute, the decision of the court was to be subject to review by the Secretary of War, and was then to be reported to Congress for final consideration and approval. When the judges of the Supreme Court,[4] sitting on circuit, were presented with these claims, they declined to act under the law [5] and reported their difficulty to the President. In *Hayburn's Case* [6] an application was made to the Supreme Court for a mandamus to compel the Circuit Court to act, but while the case was pending, another method of examining the claims was provided by Congress. This early decision against the exercise of non-judicial powers has been uniformly approved and followed in the Federal courts.[7] The Supreme Court has steadily refused to exercise a power where it lacked the means to enforce its judgment.[8] But where a statute of Congress imposed on the Circuit Courts the duty to appoint supervisors of election when certain formal petitions were presented, it was held that the courts could exercise this function under the Constitution.[9] The former decisions were distinguished, and the power upheld under the clause conferring on Congress the power by law to vest the appointment of inferior officers in the courts of law.[10]

The question is frequently presented to the State courts in the delegation to the judiciary of the power to appoint certain minor officials. The evident object of the legislature is to free these small positions from the political considerations which inevitably attach to appointments by others than the judiciary. The courts are almost evenly divided as to the constitutionaliy of such an appointing power. Those which uphold the power [11] do so out of

---

Marbury *v.* Madison, 1 Cranch 137, and in effect held that the court had the power to declare an Act of Congress unconstitutional. See 1 THAYER, CASES ON CONST. LAW, note, p. 105; article by Prof. Max Ferrand, 13 AM. HIST. REV. 283.

[4] The question seems to have been presented to all the judges of the Supreme Court except Thomas Johnson of Maryland.

[5] The judges in the district of New York, Chief Justice Jay and Justice Cushing, held that as a court they could not act, but since "the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress," they would exercise the power personally as commissioners. Afterwards the Supreme Court held in an apparently unanimous opinion that, since the act intended to confer the power on the court as a judicial function, it could not be construed as authorizing the judges to act as commissioners, and that money paid under such a certificate of the judges could be recovered. United States *v.* Todd, see 13 How. 52; Hayburn's Case, *supra.*

[6] *Supra.*

[7] United States *v.* Todd, *supra;* United States *v.* Ferreira, *supra;* Gordon *v.* United States, 2 Wall. 561, 117 U. S. 697; Muskrat *v.* United States, 219 U. S. 346; *Ex parte* Riebeling, 70 Fed. 310.

[8] Muskrat *v.* United States, *supra.*

[9] *Ex parte* Siebold, 100 U. S. 371.

[10] U. S. Constitution, Art. 2, § 2.

[11] Ross *v.* Board, 69 N. J. L. 291, 55 Atl. 310; Foster *v.* Rowe, 128 Wis. 326, 107 N. W. 635, 8 Ann. Cas. 595 and note; State *v.* George,

a reluctance to annul an act of the legislature by judicial interpretation or under some special wording of the Constitution relative to the separation of powers. Those courts which deny the power [12] have to support them the general theory of the separate departments, and the provisions in which this theory is expressed. They reason that the foundation of every political machine is the number of favors it can bestow, and to give the judiciary a large number of appointments must tend to inject political considerations into the selection of the judges. Respect for the position of a judge invariably diminishes where he must combine with his judicial duties the conferring of executive favors and has at his disposal a large patronage. Even if it were constitutional, legislation delegating such powers should be discouraged.

Out of a high respect for the character and judgment of the judiciary, the legislature has frequently provided for a review by the courts of the findings of an executive board. On this question there is general agreement that the power is non-judicial, and the courts therefore refuse to exercise it.[13] Where a statute provided that if a street car company submitted its plans and specifications for laying tracks to the municipal officials and no action was taken thereon within a certain time, the county judge on application should have the same power over the company as the municipality possessed, locating the tracks and determining their general character, it was held that the power sought to be conferred was non-judicial.[14] The court could not undertake to consider the wisdom of locating tracks on certain streets, or to inquire into the specifications of the whole work. While calling for the exercise of judgment, those are executive and legislative functions. But on a judicial question being presented, the court would act. This reasoning has usually been held conclusive.[15] It has been followed where the legislature attempted to give the judiciary power to review the location of drains, which seems to be an important matter in certain western States.[16]

No purpose would be served by an enumeration of the various

---

22 Ore. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586; Fox *v.* McDonald, 101 Ala. 51, 13 South. 416, 21 L. R. A. 529; Russell *v.* Cooley, 69 Ga. 215; People *v.* Hoffman, *supra.*

[12] Case of Supervisors of Election, 114 Mass. 247, 19 Am. Rep. 341; State *v.* Barker, 116 Iowa 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222; State *v.* Neeble, 82 Neb. 267, 117 N. W. 723, 19 L. R. A. (N. S.) 578 and note; State *v.* Rogers, 71 Ohio St. 203, 73 N. E. 460; State *v.* Brill, *supra.*

[13] Norwalk Street R. Co.'s Appeal, 69 Conn. 576, 37 Atl. 1080, 39 L. R. A. 794; Houseman *v.* Kent Circuit Judge, 58 Mich. 364, 25 N. W. 369; Tyson *v.* Washington County, 78 Neb. 211, 110 N. W. 634, 12 L. R. A. (N. S.) 350; Auditor *v.* Atchison, etc., R. Co., 6 Kan. 500.

[14] Norwalk Street R. Co.'s Appeal, *supra.*

[15] It was carefully distinguished in Zanesville *v.* Zanesville, etc., Co., 64 Ohio St. 67, 59 N. E. 781, 52 L. R. A. 150, 83 Am. St. Rep. 725.

[16] Tyson *v.* Washington County, *supra.* See extensive note on the whole subject, 60 L. R. A. 161.

other forms in which the question has been presented to the courts.[17] The test is always the nature and character of the power sought to be conferred. While loath to hold a legislative enactment invalid, the courts have carefully guarded the basic theory of our government, and all the opinions show that the question has been handled thoughtfully, lest one department acquire all the power or the judiciary lose its independence either to the legislature, the executive or to the seeker of political favor.

It has recently been held[18] by the Court of Appeals of Maryland that the issuance of a license by a circuit court to permit betting on horse racing, is a non-judicial function. In this case the application for a license was made direct to the court, which itself issued it. A former widely cited decision[19] was distinguished on the ground that in that case the county clerk issued the license, and the court was empowered merely to decide in case of dispute as to the applicant's qualifications whether the license should issue. The holding is undoubtedly in line with the other decisions[20] in the same State, where the judicial character of the judge has always been closely guarded.

In Virginia, it has been held that the power of appointing commissioners of revenue might be conferred on judges of the cirsuit courts.[21] The appointment of many other minor officials is likewise lodged there by statute. The circuit courts may also exercise the power of fixing the boundaries and determining the expediency of extending the corporate limits of cities and towns.[22] In some States the judiciary would be incapable of exercising either of these powers.

CONSTRUCTIVE NOTICE AS APPLIED TO NEGOTIABLE PAPER.—The question of what facts, evident in dealings with negotiable paper, are sufficient to charge all takers with notice of defects in the paper is one of ever present interest. Closely related to this is the subject of notice of the misuse of a position of trust and confidence, to be obtained from the method of handling by an agent of the principal's negotiable paper. In general, such constructive notice may be divided into two classes:

1. Notice imputed because of bad faith in failing to follow up a suspicion of a defect; and,

---

[17] State *v.* Young, 29 Minn. 474, 9 N. W. 737; *Ex parte* Griffiths, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398; Board of Commissioners *v.* Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402.

[18] Close *v.* Southern Maryland Agricultural Ass'n (Md.), 108 Atl. 209.

[19] McCrea *v.* Roberts, 89 Md. 238, 43 Atl. 39, 44 L. R. A. 485.

[20] Beasley *v.* Ridout, 94 Md. 641, 52 Atl. 61; Board of Supervisors *v.* Todd, 97 Md. 247, 54 Atl. 963, 99 Am. St. Rep. 438, 62 L. R. A. 809.

[21] Barbour *v.* Grimsley, 107 Va. 814, 61 S. E. 1135.

[22] Henrico County *v.* City of Richmond, 106 Va. 282, 55 S. E. 683; note dissent of Buchanan, J. See also Winchester, etc., R. Co. *v.* Commonwealth, 106 Va. 264, 55 S. E. 692.